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No. 01-563

In the
Supreme Court of the United States

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, A PENSION TRUST, AND HOWARD MCDOUGALL, TRUSTEE,

PETITIONERS,

V.

BASIC AMERICAN INDUSTRIES, INC., ET AL.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit correctly held, consistent with this Court's decision in *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 552 U.S. 192 (1997), that under the facts of this case a cause of action arose respecting the entire withdrawal liability owed by a bankrupt employer to an employee benefit plan, thereby commencing the six-year statute of limitations for suit under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1301 et seq., when the bankrupt employer ceased operations (thus disabling itself from fulfilling its withdrawal liability obligation) and the plan demanded payment in full.

CORPORATE DISCLOSURE

None of the Respondents has a parent corporation, and no public company owns stock in any corporation which is a Respondent.

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RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

The judgment of the court of appeals was entered on June 5, 2001. A petition for rehearing was denied on July 3, 2001. The petition for a writ of certiorari was filed on

October 1, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In addition to the statory provisions included the petition this case involves 29 U.S.C. § 1383(a)(2) and 29 U.S.C. § 1399(c)(2), included in the appendix hereto.

STATEMENT OF THE CASE

Prior to 1989, three affiliated employers, collectively known as "Allied Grocers," entered into collective bargaining agreements that required them to make pension contributions to petitioner Central States, Southeast and Southwest Areas Pension Fund, a Pension Trust ("Central States"), on behalf of certain employees. On June 22, 1989, Allied Grocers filed for relief under Chapter 11 of the U.S. Bankruptcy Code (the "Bankruptcy"). Under Central States' "Rules and Regulations Pertaining to Employer Withdrawal Liability" ("Withdrawal Liability Rules"), this entitled Central States to declare a default of Allied Grocers' withdrawal liability obligation. The Withdrawal Liability Rules also specifically provide that "[i]n the event of a default, the outstanding amount of the withdrawal liability shall immediately become due and payable."[1] On May 18, 1990, Central States filed proofs of claim for the entire withdrawal liability in Allied Grocers' Bankruptcy proceeding, an amount totaling $751,918.80. Pet. 4-5.

On or about June 2, 1990, Allied Grocers ceased operations. As a result, Allied Grocers and all trades or businesses under common control with them (the "Allied Controlled Group") effected as a matter of law a complete withdrawal from Central States under Section 4201(b) of the

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[1] Defendants-Appellees' Supplemental Appendix, filed in the court of appeals ("7th Cir. Supp. App.") at 23.

Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (the "MPPAA"), 29 U.S.C. § 1381(b). Consequently, all members of the Allied Controlled Group became potentially liable for Allied Grocers' withdrawal liability to Central States. Although it had already filed proofs of claim in the Bankruptcy, Central States sent a notice and demand for payment of withdrawal liability to Allied Grocers on or about June 18, 1990 (the "Notice and Demand"). The amount of the Notice and Demand, $751,918.80, was precisely the same amount that Central States had demanded in its proofs of claim in Allied Grocers' Bankruptcy on May 18, 1990. Allied Grocers never initiated arbitration on the correctness of Central States' assessment of withdrawal liability. Pet. App. 2a-3a, 16a-17a.

On July 31, 1996, more than six years after the latest of the foregoing events, petitioners filed a Complaint in the United States District Court for the Northern District of Illinois seeking to collect MPPAA withdrawal liability under 29 U.S.C. § 1451(a)(1) from certain members of the Allied Controlled Group (the "Original Defendants").[2] The Complaint asserted that the Original Defendants were jointly and severally liable for withdrawal liability under 29 U.S.C. § 1301(b)(1), and sought to collect $751,918.80, the same amount sought by Central States in its proofs of claim in the Bankruptcy and in the Notice and Demand to Allied Grocers. Later, petitioners filed a First Amended Complaint adding additional members of the Allied Controlled Group as co-defendants. All of the defendants (hereafter, respondents) filed motions to dismiss the Complaint and the First Amended Complaint on the ground that petitioners' withdrawal liability claim was barred by the applicable MPPAA six-year statute of limitations. Pet. App. 3a, 17a.

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[2] Central States had by that time already settled with Allied Grocers. Pet. App. 3a.

On September 30, 1997, the district court made several rulings which, in essence, granted respondents' motions to dismiss. Pet. App. 17a, 30a-31a. The court indicated that it would issue a more detailed order setting forth the grounds for these rulings on or before October 31, 1997, but it failed to do so and petitioners pursued an appeal. Pet. App. 13a-14a. On February 27, 1998, however, the Seventh Circuit dismissed that appeal due to the lack of an explanation by the district court and the absence of an entry of a final judgment under Rule 58 of the Federal Rules of Civil Procedure. Pet. App. 13a-14a.

On remand, after considering supplemental briefs addressing *inter alia* the impact of this Court's decision in *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192 (1997), the district court reaffirmed its original rulings and dismissed the action in its entirety as time-barred by the MPPAA's six-year statute of limitations. Pet. App. 15a-28a.

The court of appeals affirmed. Pet. App. 1a-12a. Writing for a unanimous panel, Judge Posner explained that the "thrust" of this Court's opinion in *Bay Area* "was to assimilate statute of limitations issues under the [MPPAA] to the legal principles generally applicable to statutes of limitations issues," Pet. App. 4a, and on that understanding held that petitioners' statute of limitations

> beg[an] to run—still more than six years before Central States sued—no later than June 18, 1990, when, Allied [Grocers] having ceased operations on June 2, Central States served on Allied [Grocers] a formal demand for payment of the withdrawal liability set forth in the proof of claim that it had filed in the bankruptcy proceeding. Complete cessation of operations precipitates . . . the employer's (and any affiliates') withdrawal liability. That was the default,

> and the demand determined its amount (before that determination, a suit would have been premature).

Pet. App. 9a. The court of appeals acknowledged that, as required by law, Central States had demanded payment under an installment plan, but the court concluded that under *Bay Area* this "statutory requirement does not prevent the fund from accelerating all future payments upon default, thus making all the installments due at once." Pet. App. 10a-11a (citation omitted).

On June 19, 2001, Central States filed a petition for rehearing and a petition for rehearing *en banc*. All of the judges on the original panel voted to deny the petition, and none of the active judges requested a vote on the petition for rehearing *en banc*. Pet. App. 29a.

ARGUMENT

The Seventh Circuit held that a cause of action arose by reason of acceleration of the entire amount due, thereby commencing the six-year statute of limitations for withdrawal liability suits, when Allied Grocers (already in Chapter 11 proceedings) defaulted on its withdrawal liability obligation by ceasing operations and Central States thereafter demanded payment in full of the entire amount of the withdrawal liability obligation. The decision in this case is the first (and, so far, only) court of appeals decision applying this Court's teachings in *Bay Area* in circumstances where the withdrawing employer is bankrupt and disabled from paying its withdrawal liability.

In applying common law anticipatory repudiation rules in this context to determine when petitioners' cause of action arose for statute of limitations purposes, the court of appeals was expressly guided by this Court's reliance on common law principles in *Bay Area*. And the court of appeals' conclusion—that petitioners' suit is time-barred—followed logically and reasonably from those principles.

Although petitioners disagree with the court of appeals' decision in several respects, the decision is consistent with *Bay Area*, and it does not conflict with the decision of any other court of appeals. Central States' statement (Pet. 10) that the "Seventh Circuit's decision in this case creates uncertainty as to when a cause of action accrues under MPPAA" fails to establish a confict—direct, apparent or otherwise—that requires resolution by this Court. *See Lambert v. Wicklund*, 520 U.S. 292 (1997). Nor have petitioners demonstrated that the questions presented, though important to the parties, are of significant national importance. There is, accordingly, no warrant for this Court to grant review. If a circuit conflict ultimately arises on these issues—which have in the four years since *Bay Area* featured solely in this one appellate case—this Court can resolve it then with the benefit of that further percolation in the lower courts.

I. THE COURT OF APPEALS' DECISION IS CORRECT AND DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *BAY AREA* OR WITH THE DECISION OF ANY OTHER COURT OF APPEALS

In *Bay Area*, this Court addressed when the MPPAA's six-year statute of limitations began to run on a pension fund's action to collect unpaid withdrawal liability by applying basic, common law limitations rules. As the court of appeals observed, the "thrust of the [*Bay Area*] opinion . . . was to assimilate statute of limitations issues under the [MPPAA] to the legal principles generally applicable to statutes of limitations." Pet. App. 4a (citing *Bay Area*, 522 U.S. at 195, 208, 210). In particular, this Court held that the MPPAA "incorporates the standard rule that the limitations period commences when the plaintiff 'has a complete and present cause of action,'" and that "a cause of

action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Bay Area*, 522 U.S. at 201 (citation omitted).

This Court then applied that principle to the facts of the case before it, using the common law rule applicable to missed installment payments. *Id.* at 208. Applying that rule, it concluded that the plan's cause of action did not accrue until the employer failed to make its first payment, because until that time the employer had not defaulted and the plan had no cause of action. *Id.* at 208-09. Moreover, because the plan had not opted to accelerate the debt upon the first or any successive missed payment, this Court held that, under the standard installment-payment rule, the limitations period started to run on each payment only when the employer defaulted on that payment. *Id.*

The Court recognized, however, that the installment-payment rule is not always controlling. This Court stated:

> Where there is an acceleration clause giving the creditor the right upon certain contingencies to declare the whole sum due, the statute begins to run, only with respect to each installment, at the time the installment becomes due, *unless the creditor exercises his option to declare the whole indebtedness due, in which case the statute begins to run from the date of the exercise of his option.*

Id. at 209 n.5 (quoting *Board of Trustees of Dist. No. 15 Machinists' Pension Fund v. Kahle Eng'g Corp.*, 43 F.3d 852, 857 (3d Cir. 1994) (quoting 51 Am. Jur. 2d *Limitations of Actions* § 133 (1970))) (internal quotations omitted) (emphasis added). This Court did not purport, however, to discuss or define all circumstances or events that might result in "acceleration." The task of clarifying the application of acceleration principles to varying factual situations, including those involving an employer's

bankruptcy, was appropriately left for development in the lower federal courts.

In this case, the Seventh Circuit correctly recognized that this Court's application of the installment-payment rule—*i.e.*, that "'each missed payment [of an MPPAA installment obligation] creates a separate cause of action with its own six-year limitations period'"—was rendered in and is limited by the "context" of its decision in *Bay Area*, "which did not include bankruptcy," Pet. App. 4a (quoting *Bay Area*, 522 U.S. at 195), and it correctly applied acceleration principles, rather than the installment-payment rule, to the very different facts of this case.

The court of appeals observed that, in addition to failing to make a payment that has become due, a payor can likewise default "by repudiating the obligation to pay." Pet. App. 4a. "[A]nticpatory repudiation," the court explained, "is a breach of contract that entitles the payee to sue without waiting for the date when payment was due to come and go." Pet. App. 4a-5a. It is well established that "anticipatory repudiation (sometimes called anticipatory breach) is conceived of primarily as a trigger of a contract party's right of self-help, like the breach of a condition in a contract." Pet. App. 5a (citing *C.L. Maddox, Inc. v. Coalfield Servs., Inc.*, 51 F.3d 76, 81 (7th Cir. 1995); *First Nat'l Bank v. Continental Ill. Nat'l Bank & Trust Co.*, 933 F.2d 466, 469 (7th Cir. 1991); *American Hosp. Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589, 599 (7th Cir. 1986); E. Allan Farnsworth, *Contracts* § 8.20 (3d ed. 1999)). An anticipatory breach "occurs when it is reasonably certain that the other party is not going to meet its obligations under the contract in timely fashion. At that point the potential victim is freed from its own contractual obligations and authorized to take all reasonable self-protective measures, including suing." Pet. App. 12a.[3]

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[3] Petitioners claim that the doctrine of anticipatory repudiation is inappropriate here because "there was no additional performance required

Applying that principle, the court of appeals found it reasonably certain that Allied Grocers would not be able to pay its withdrawal liability as of June 2, 1990, when Allied Grocers, having previously filed for protection under Chapter 11, ceased operations. Pet. App. 9a. Allied Grocers' termination of operations effected its complete withdrawal from the plan and triggered its withdrawal liability. 29 U.S.C. § 1383(a)(2). And, in light of Allied Grocers' Bankruptcy, the court of appeals correctly recognized that "[w]hen Allied [Grocers] ceased operating, Central States knew it would never see any of the scheduled installment

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by the pension plan" and because the obligation to pay withdrawal liability is akin to a contract requiring "the payment of money only." Pet. 24-25. Contrary to petitioners' argument, the MPPAA and the terms of the pension plan imposed a host of continuing obligations on Central States after Allied Grocers' complete withdrawal from the fund. To begin with, Central States retained the core obligation to pay the pensions of Allied Grocers' former employees. Pet. App. 6a. Moreover, Central States was required to calculate the amount of withdrawal liability owed by Allied Grocers in accordance with the MPPAA and the terms of the pension plan, *see* 29 U.S.C. §§ 1382, 1391, and further required to send proper written notice and demand for payment of the amount of withdrawal liability, *see* 29 U.S.C. §§ 1382, 1399(b)(1). In sum, "MPPAA's complex scheme for calculating withdrawal liability" is simply not, as Central States alleges, analogous to a contract solely for the payment of money. *See Bay Area*, 522 U.S. at 196. Petitioners seek to discount the significance of Central States' continuing nonmonetary obligations by protesting that Central States' obligation to pay pensions to affected employees is imposed by statute, not contract, and that the plan is obliged by statute to pay these pensions regardless of whether the employer pays its corresponding withdrawal liability. Pet. 23. This argument misses the most fundamental point in *Bay Area*—that the basic common law principles that determine what triggers statutes of limitations for breaches of contract (in that case, breaches of installment contracts) supply the rules of decision for determining what triggers the statute of limitations for breaches of MPPAA withdrawal liability obligations, even though the latter are not purely contractual. *See Bay Area*, 522 U.S. at 208-10.

payments." Pet. App. 11a.[4] As the court explained, because Central States had an unsecured claim,

> Allied [Grocers] could not make any of the installment payments without violating the absolute priority rule of 11 U.S.C. § 1129(b). With fewer assets than claims, Allied [Grocers] would certainly pay the fund less than the full value of its claim. The best the fund could hope for was a partial settlement of the withdrawal liability. *It should therefore have concluded on June 2, 1990, that Allied [Grocers] had repudiated its withdrawal liability. Put differently, on that day it became clear that Allied [Grocers] had disabled itself from paying the withdrawal liability.*

Pet. App. 11a (emphasis added). Allied Grocers' termination of operations thus constituted a default on its entire withdrawal liability obligation, since (as the court of appeals observed) "[t]he standard rule in contract law is that the promisee is free to sue for anticipatory repudiation as soon as the promisor has disabled itself from performing its contractual obligations." Pet. App. 11a (citing *Restatement (Second) of Contracts* § 250(b) (1981)).[5]

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[4] Petitioners contend that the court of appeals erred in this conclusion, because an employer that ceases *covered* operations (the statutory event that causes a complete withdrawal from a plan under 29 U.S.C. § 1383(a)(2)) does not necessarily cease *all* operations, and may in fact be able to produce enough revenue from *noncovered* operations to pay withdrawal liability. Pet. 19. That argument is unavailing here because the court of appeals' finding that Allied Grocers ceased its operations was not limited to Allied Grocers' "covered operations." *See* Pet. App. 2a, 9a, 11a.

[5] Petitioners do not dispute the court's conclusion that Central States should have recognized by June 2, 1990, Allied Grocers' inability to pay its withdrawal liability. They argue, however, that Allied Grocers' anticipatory repudiation should not carry over to affect the Allied Controlled Group. Pet. 26. Contrary to petitioners' argument, the court of appeals correctly recognized that Allied Grocers' default was contemporaneous with the default of the Allied Controlled Group,

Having determined that Allied Grocers defaulted on its withdrawal payment obligation on June 2, 1990, the court of appeals reasonably concluded that Central States took the last step necessary to establish a "complete and present cause of action" within the meaning of *Bay Area*, thus triggering the six-year statute of limitations, when it "determin[ed] the amount [of withdrawal liability] due, which happened, at the very latest, on June 18, more than six years before the suit was brought." Pet. App. 11a. On that date, Allied Grocers' default, *i.e.*, the anticipatory repudiation, and Central States' formal Notice and Demand for full payment of the withdrawal liability sent two weeks later, *i.e.*, the acceleration, converged to produce a full and complete cause of action, thereby triggering the MPPAA six-

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observing that "[c]omplete cessation of operations precipitates, as we have seen, the employer's (*and any affiliates'*) withdrawal liability." Pet. App. 9a (emphasis added). Although petitioners contend that there could be no anticipatory repudiation by Allied Grocers unless the entire Allied Controlled Group were also hopelessly insolvent, petitioners cite no legal authority to support that contention. To the contrary, the plain language of the statute does not differentiate amongst employers, controlled group members, or any other potential defendants, solvent or insolvent, in this regard. *See* 29 U.S.C. § 1301(b)(1) (stating that where employer is under "common control" with other trades or businesses, all entities are treated as single employer). The limitations statute simply rings the bell for all to hear. *See Central States, Southeast & Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1375 (7th Cir. 1992) (reiterating that notice to one controlled group member is notice to all); *Central States, Southeast & Southwest Areas Pension Fund v. Mississippi Warehouse Corp.*, 853 F. Supp. 1053, 1059 (N.D. Ill. 1994) (holding that action brought against alleged controlled group member jointly and severally liable for withdrawal liability must be commenced within six-year limitations period under 29 U.S.C. § 1451(f)). Moreover, even if petitioners' position were better supported, there is no disagreement among the circuits on this issue, and petitioners' disagreement with the Seventh Circuit over this aspect of the common law doctrine of anticipatory repudiation does not warrant this Court's review.

year statute of limitations for the entire amount of withdrawal liability.[6]

Petitioners contend that these events were not sufficient to trigger the statute of limitations because this Court recognized in *Bay Area* that the statutory right to accelerate the entire withdrawal liability upon a default is permissive and, according to petitioners, Central States made no election to accelerate here. *See* Pet. 16-18, 21-25. This argument has no merit in fact or law. To begin with, contrary to petitioners' assertion, the court of appeals quite reasonably concluded, in light of Allied Grocers' Chapter 11 status, that Central States' demand of full payment upon Allied Grocers' cessation of operations *did* constitute an election to accelerate the entire withdrawal liability. Indeed, that is the only reasonable interpretation of Central States' action, since Central States' Withdrawal Liability Rules provide that in the event of a default the full amount of the withdrawal liability "*shall* immediately become due and payable." 7th Cir. Supp. App. at 23 (emphasis added).

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[6] Though Allied Grocers never sought arbitration, petitioners argue that the statute of limitations could not begin to run until the close of the period in which Allied Grocers *could have* requested arbitration. Pet. 20-21. This argument is not reflected or fairly included within either of petitioners' questions presented, and it is therefore not preserved for this Court's review. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 140 (1998). Moreover, the argument is meritless and not remotely certworthy. In light of the statutory requirement to pay withdrawal liability on schedule irrespective of any request for arbitration, 29 U.S.C. § 1399(c)(2), the court of appeals correctly noted that, once the statute of limitations commenced by reason of Allied Grocers' anticipatory repudiation, it ran independently from any theoretical arbitration option. *See* Pet. App. 9a ("[T]he right to arbitration presupposes that the cause of action has already arisen."). The only case petitioners cite to the contrary is the Seventh Circuit's decision in *Chicago Truck Drivers Union Pension Fund v. Century Motor Freight, Inc.*, 125 F.3d 526 (7th Cir. 1997). That case is inapposite—as it *did not* involve a bankrupt and nonoperating employer, and the employer *did* request arbitration—but even if it were closer to the mark, an intra-circuit conflict would not warrant this Court's intercession. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam).

Petitioners' disagreement with that factual finding is meritless and, in any event, is hardly a matter warranting this Court's review. *See, e.g., Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

Moreover, petitioners fail to support their contention that a voluntary election to accelerate is required as a matter of law where, as here, the employer has taken action disabling itself from compliance with its full withdrawal payment obligations. Although the statute provides that a plan *may* accelerate in the event of a default, *see* 29 U.S.C. § 1399(c)(5), that provision is not dispositive of the separate question of when the statute of limitations begins to run. If it were, this Court could have decided *Bay Area* based on the statute alone. Instead, the Court made it clear that the MPPAA incorporates common law rules for determining what events trigger its statute of limitations, 522 U.S. at 201, and it applied the appropriate common law rule to decide the case before it. Under the facts in *Bay Area*, which did not involve bankruptcy, the Court concluded that the general installment-payment rule applied. Under that rule, the Court found that, absent a voluntary decision by the creditor to accelerate, "'a new cause of action,' carrying its own limitations period, 'arises from the date each payment is missed.'" *Id.* at 208 (citation omitted). Under the very different facts of this case, the court of appeals applied a different common law rule, the doctrine of anticipatory repudiation. The court rightly found that "nothing in [*Bay Area*] or its logic . . . suggest[s] that the principles of anticipatory repudiation have no role to play under the MPPAA." Pet. App. 6a.

Petitioners argue (Pet. 24-25) that the court of appeals misapplied this common law doctrine, and that the common law of anticipatory repudiation in fact vests the creditor with complete discretion whether to accelerate the debt. But the sources petitioners cite—mostly obsolete cases and

treatises—do not come close to establishing a current majority rule to that effect and do not even address circumstances where, as here, the debtor plainly and simply has no ability to perform. The only current case petitioners cite is *Franconia Assocs. v. United States*, 240 F.3d 1358 (Fed. Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3193 (U.S. Sept. 10, 2001) (No. 01-455). This case, however, cuts against (not for) their position. The Federal Circuit held that, in circumstances "when an obligor communicates to an obligee that he will commit a breach in the future," the statute of limitations "begins to run from the date of performance specified in the contract unless the obligee elects to sue earlier for anticipatory repudiation." *Id.* at 1363. But the Federal Circuit distinguished that circumstance from the case before it, where Congress had statutorily forbidden the government from complying with the contract, in which case the court found that the cause of action accrued, and the statute of limitations began to run, on the date of Congress's enactment. This case is more like the latter circumstance, because here (as in *Franconia*) the obligor did not merely renounce an intent to perform but disabled itself from performing. The only other authorities petitioners cite to support their supposed "general rule" of voluntary acceleration are 36-year-old dictum from a footnote in *Penn-Ohio Steel Corp. v. United States*, 354 F.2d 254, 272 n.35 (Ct. Cl. 1965), and a 45-year-old state court decision, *White v. Prenzler*, 131 N.E.2d 540, 543 (Ill. 1956), which turned on the plaintiff's lack of knowledge of the purported anticipatory repudiation. These antiquated citations demonstrate no split of authority, much less a current conflict warranting a grant of certiorari.[7]

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[7] Petitioners argue that the MPPAA already includes the concept of anticipatory repudiation as an event of statutory default and does not except this class of defaults from its rule of permissive acceleration. *See* Pet. 17-18 (citing 29 U.S.C. § 1399(c)(5)). Petitioners fail to appreciate the distinction between circumstances presenting a substantial likelihood of

In sum, the court of appeals expressly relied on this Court's teaching in *Bay Area* when it applied the common law doctrine of anticipatory repudiation to the circumstances presented in this case. Its decision took account of the relevant provisions of the MPPAA, and it does not conflict with the decision of any other court of appeals. Indeed, petitioners point to no other court of appeals case that deals with the accrual of a withdrawal liability action in similar circumstances, much less a case that conflicts with the Seventh Circuit's decision here. Their petition for certiorari reduces to a contention that the court of appeals erred in its application of *Bay Area* to the unique factual circumstances of this case. As discussed above, petitioners are incorrect, but even if their argument had more merit, they have provided no justification for this Court to review this fact-bound dispute.

II. THE JUDGMENT IN THIS CASE COULD ALSO BE AFFIRMED, IN THE ALTERNATIVE, BASED ON PRIOR TRANSACTIONS THAT WOULD HAVE TRIGGERED THE STATUTE OF LIMITATIONS EVEN EARLIER

The court of appeals identified several dates and events as potential triggers for the acceleration of Allied Grocers' withdrawal liability obligation and the six-year statute of limitations:

- May 18, 1990 - the date when Central States filed proofs of claim in the Allied Grocers' Bankruptcy.

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nonpayment (the trigger for default under Section 1399(c)(5)) and the circumstances of this case, where an employer in bankruptcy has, by ceasing operations, rendered itself wholly unable to pay. Neither the statute nor *Bay Area* specifically addresses the consequences of default in these circumstances. In any event, Central States' argument is purely academic because, as noted above, Central States' own rules in this case provided for *mandatory* acceleration immediately upon Allied Grocers' default.

- June 2, 1990 - the date when Allied Grocers ceased operations and withdrew as a matter of law from the Central States pension plan.

- June 18, 1990 - the date when Central States sent its Notice and Demand to Allied Grocers, demanding payment in full of the calculated withdrawal liability.

Each of these events occurred more than six years before Central States filed its collection action. Thus, the judgment in this case is correct no matter which event, singly or in combination, triggered Central States' acceleration of Allied Grocers' withdrawal liability.

That debt reasonably could have been accelerated (and the statute of limitations begun) as early as May 18, 1990, when Central States filed proofs of claims in Allied Grocers' Bankruptcy, demanding payment in full of the calculated withdrawal liability. Although the court of appeals rejected this filing as the event constituting Allied Grocers' default and Central States' acceleration, at least one district court has found such an event qualifying. In *I.L.G.W.U. National Retirement Fund v. Meredith Grey, Inc.*, 190 F.R.D. 324 (S.D.N.Y. 1999), an employer filed for bankruptcy, and the pension fund then filed a proof of claim in the bankruptcy proceedings for the entire amount of withdrawal liability. The district court, relying on this Court's decision in *Bay Area*, found as follows:

> [O]n July 16, 1987, the Fund filed a proof of claim in the [employer's] bankruptcy proceedings, thereby accelerating all payments and demanding the entire amount of the withdrawal liability. *Under Bay Area Laundry, the statute of limitations began to run on the full amount of the withdrawal liability upon the acceleration of the debt. Accordingly, the relevant*

> *limitations period expired on July 16, 1993—six years after the acceleration.*

Id. at 328 (citation omitted) (emphasis added). The judgment in this case is sustainable under this same analysis.

The debt in this case could also reasonably have been accelerated (and the statute of limitations begun) on June 2, 1990, when Allied Grocers ceased operations, thereby effecting a complete withdrawal from Central States' pension plan. Indeed, the court of appeals acknowledged that "it is arguable that the statute of limitations actually began to run earlier than June 18, on June 2, since Central States had already computed the withdrawal liability and sent notice of the amount, via the proof of claim, to Allied ...." Pet. App. 10a. This provides a second alternative basis for affirmance.

On June 18, 1990, Central States sent its Notice and Demand for payment of withdrawal liability to Allied Grocers for the same amount previously demanded in Central States' proofs of claim in the Bankruptcy. The court of appeals held that the statute began to run at that time. Coupled with the cessation of Allied Grocers' operations, the court concluded that the Notice and Demand completed the chain of events leading from Allied Grocers' default to the commencement of the statute of limitations.

Under any of these analyses, the result is the same: Central States' suit was time-barred, since the Complaint seeking payment in full of Allied Grocers' withdrawal liability was filed more than six years after any of these relevant events. Because the judgment, amply justified by the court of appeals' opinion, is also sustainable on alternate grounds, petitioners' plea for error-correction should fall on especially deaf ears.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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